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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BEASLEY WILLS, Petitioner, **v.** **D. K. SISTO, Warden,** Respondent.	C 07-06003 TEH (PR)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER

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STATEMENT OF THE CASE

On April 26, 2005, an Alameda County jury convicted petitioner of two counts of robbery and possession of a firearm by a felon. The jury also found true the allegation that petitioner used a firearm in the commission of the offenses. Ex. 1, Clerk's Transcript ("CT") 336-37, 339-43. Petitioner admitted that he had served a prior prison term. CT 114. On October 13, 2005, petitioner was sentenced to thirteen years in state prison. CT 175-78.

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On March 20, 2007, the California Court of Appeal affirmed the judgment of conviction. Ex. 6, attached Ex. A.[1/] On June 20, 2007, the California Supreme Court denied review. Exhs. 6, 7.

On November 28, 2007, petitioner filed the instant federal habeas corpus petitioner under 28 U.S.C. § 2254, raising the following issues: 1) the trial court erred in excluding the testimony of an expert witness regarding factors affecting eyewitness testimony in violation of due process; 2) the trial court erred in admitting opinion testimony regarding the propensity of drug users to commit robberies, which prejudiced petitioner and requires reversal; and 3) the cumulative impact of the errors required reversal. Petition at 6.

On March 27, 2008, this Court issued an Order to Show Cause, directing respondent to answer pursuant to Rule 5 of the Rules Governing Section 2254 Cases.

STATEMENT OF FACTS

The California Court of Appeal summarized the facts of the offenses as follows:

> At around 7:50 p.m. on February 3, 2005, an armed robber entered the Beacon gas station at Foothill and Havenscourt Boulevards in East Oakland. Two employees of the gas station, Vijay Behl and Lucio Garcia, were on duty at the time. Garcia was behind the cash register, Behl was standing on the customer side of the counter speaking on his cell phone. No other customers or employees were present.
>
> The robber approached the counter and drew a large revolver from his waistband. He aimed the revolver at Behl's chest, threatened to kill him, and demanded money. Garcia produced some money from the cash register and placed it on the counter. The robber repeated his demand for money and continued throughout to threaten Behl. Garcia removed the cash tray from the register and placed it on the counter. The robber filled his pockets with all the cash from the tray, backed out of the gas station and fled. The gas station lost $400-$500 in the robbery.
>
> After the robber left, Garcia and Behl summoned Oakland Police by activating the gas station's security alarm. Behl also described the robbery and the suspect to a 911 operator. Four security cameras recorded the crime but the poor quality of the tape precluded any meaningful depiction of the perpetrator. The robber also concealed himself from the cameras by his clothing and by walking backwards out of the gas station.
>
> On March 3, 2005, appellant's step-brother, Eric Delk, told police appellant robbed the Beacon gas station on February 3. Delk was in custody on vehicle theft charges at the time, and appellant was also in custody on an unrelated charge. The investigating officers arranged an identification lineup to corroborate Delk's information with the two eyewitnesses.

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1. The California Court of Appeal opinion is attached to the Petition for Review as Ex. A.

> Behl and Garcia attended a lineup on March 9, at the Oakland police station. The lineup included appellant and five "fillers" chosen by appellant from fellow inmates in accordance with standard lineup procedures. At the lineup appellant and the fillers each donned a black knit beanie, stepped forward and said: "Give me the money." After the lineup, Behl unequivocally identified appellant as the robber. Garcia tentatively identified appellant, but indicated his uncertainty by marking his lineup card with a question mark. On March 25, 2005, police formally charged appellant with robbing the Beacon gas station.

STANDARD OF REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which imposes a "highly deferential" standard for evaluating state court rulings and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Under AEDPA, the federal court has no authority to grant habeas relief unless the state court's ruling was "contrary to, or involved an unreasonable application of," clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). A decision constitutes an unreasonable application of Supreme Court law only if the state court's application of law to the facts is not merely erroneous, but "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). The petitioner bears the burden of showing that the state court's decision was unreasonable. *Visciotti*, 537 U.S. at 25.

ARGUMENT

I.

THE CALIFORNIA STATE COURT PROPERLY REJECTED PETITIONER'S DUE PROCESS CLAIM BASED ON EXCLUSION OF EXPERT WITNESS TESTIMONY

In ground one, petitioner claims that the trial court erred in exclusion of an expert witness on due process grounds. Petition at 6. Ground one should be rejected because the California court did not unreasonably apply controlling federal law in denying the claim.

A. State Court Proceeding

Prior to petitioner being identified as a robbery suspect in this case, Eric Delk, petitioner's stepbrother, gave a statement to police officers informing them that it was petitioner who committed the robbery at the Beacon Gas Station. RT 188–89, 241–46. Once Delk's statement was received, Officer Jadallah, the robbery investigator, coordinated a lineup to be viewed by the eyewitnesses,

which involved petitioner and five other "fillers" of petitioner's choosing. RT 241–44. From the lineup, Behl immediately and positively identified petitioner as the person who had committed the robbery at the gas station. RT 25, 64. The second witness, Garcia, placed a question mark over petitioner's number, and admitted that, although he knew immediately that it was petitioner who committed the robbery, he was apprehensive and fearful about being further involved in the trial of this case. RT 134. At trial, Behl and Garcia both testified that they were certain that petitioner was the person who committed the robbery on February 3, 2005. RT 49, 69, 104, 115–16, 146.

To discredit the identifications, petitioner sought to introduce eyewitness expert testimony of Dr. Robert Shomer at trial and argued that the facts present a possible case of mistaken identification and the expert would have discussed the factors of CALJIC No, 2.92 in light of this case. Ex. 4 at 16–17. The trial court, relying on the California Supreme Court's holding in *People v. McDonald*, 37 Cal.3d 351 (1984), denied the request as unnecessary on the ground that the evidence as a whole, including Erik Delk's testimony, substantially corroborated the identifications. CT 96–98.

The California Court of Appeal rejected petitioner's claim that the trial court's exclusion of his expert witnesses testimony deprived him of his constitutional right to due process:

> In contrast to the contradictory and uncertain testimony from multiple eyewitnesses seen in *McDonald*, the eyewitness testimony from the two victims here was focused, consistent and assured. Both witnesses observed the robber in close proximity and in a well-lit environment. Both observed their assailant for at least 30 seconds. Both positively identified appellant at the police line up, the preliminary hearing and at trial. The only flaws in any of the six identifications were Garcia's hesitancy at the lineup (which he later explained) and both witnesses failure to describe certain minor, distinguishing features (primarily appellants missing bottom teeth).
>
> Moreover, in *McDonald* the reliability of the eyewitness identification was undermined by a very strong alibi defense. By comparison, appellant's alibi defense was weak. Appellant testified he had been buying a car on the night of the robbery. The only corroboration for his alibi was the testimony of Dion Jones, a lifelong friend. On cross-examination Jones admitted his uncertainty about the exact date of the car purchase. Appellant did not produce any documentary or physical evidence to support his alibi. None of the other individuals either involved in the sale, or with whom appellant claimed he interacted that night appeared to testify.
>
> Furthermore, the eyewitness identification here was substantially corroborated by evidence giving it independent reliability. (*McDonald, supra*, 37 Cal.3d at p. 377.)
>
> Eric Delk approached police and incriminated appellant independently of their investigation appellant was not considered a suspect at the time. Delk's information

> included appellant's boast about robbing the Beacon gas station and a description of appellant's gun which matched the eyewitnesses descriptions.
>
> The proposed testimony of Charles would also have corroborated the eyewitness accounts. The People expected her, like Delk, to give a similar description of the revolver and also to testify she and appellant lived two blocks from the gas station. The close proximity of appellant's residence supported Garcia's statement the robber fled on foot.
>
> Moreover, even if the trial court erred in excluding appellant's expert testimony, any error was harmless. (See *McDonald, supra*, 37 Cal.3d at p. 376 [trial courts exclusion of eyewitness expert is reviewed under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, and reversal is warranted only if a reviewing court finds it reasonably probable a result more favorable to defendant would have resulted absent the error].) In addition, *McDonald* focused on the length of the jury's deliberations (inferring from 19 hours of deliberations three times longer than the argument phase that the jury found the case difficult to decide). (*McDonald*, at p. 376, fn. 23.)
>
> The exclusion of Dr. Shomer's testimony did not preclude appellant from arguing mistaken identity. Defense counsel did so by impeaching the eyewitnesses on cross-examination. She also made the reliability of eyewitness testimony a central theme of closing argument. Although Dr. Shomer may have added gravitas or empirical data to the arguments, it is not reasonably probable a different result would have obtained. The jury heard essentially the same arguments and still took under 45 minutes to return a guilty verdict. Counsel also forcefully presented defendants alibi defense and reiterated it in closing. The jury also found this unpersuasive. We therefore conclude appellant was not prejudiced by the exclusion of Dr. Shomer's testimony. It is not reasonably probable a result more favorable to defendant would have obtained had the testimony been allowed.

Ex. 6, attached Ex. A at 7–10.

Here, petitioner once again argues that the trial court's exclusion of expert witness testimony deprived him of his constitutional right to present a defense. Petition at 6.

B. The State Court's Finding Was Not Unreasonable

The decision to admit evidence of expert testimony on eyewitness identification is left to the broad discretion of the trial judge and "there is no federal authority for the proposition that such testimony *must* be admitted." *Jordan v. Ducharme*, 983 F.2d 933, 938-39 (9th Cir. 1993); *United States v. George*, 975 F.2d 1431, 1432 (9th Cir. 1992); *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986); *cf. United States v. Brewer*, 783 F.2d 841, 843 (9th Cir. 1986) (finding the trial court did not abuse its discretion when excluding proffered expert eyewitness testimony of Dr. Shomer that it deemed not "needed in the case" because the jury could determine from observing the witnesses and from hearing their testimony on direct and cross-examination whether or not the witnesses were accurate in their perceptions).

Here, the trial court excluded Dr. Shomer's testimony after it deemed the evidence

unnecessary. The trial court found that the jurors were able to determine whether the witness had the capacity to make an identification based on the testimony at trial along with the jury instructions given. Petitioner was given ample opportunity to challenge Behl and Garcia's identification by cross-examination and by trial counsel's comments during final argument. Petitioner's counsel spent considerable time, both during Garcia's cross-examination (RT at 115-30) and closing argument (RT at 780-85), attacking the validity of Garcia's identification. In particular, petitioner's counsel requested that the jury pay close attention to the factors affecting eyewitness identification enumerated in CALJIC No. 2.92 (Factors to Consider in Proving Identity by Eyewitness Testimony).[2/] (RT at 781.) In light of the court's instruction with CALJIC No. 2.92 and the

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2. CALJIC No. 2.92, as given, provided:

> Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy pf the witness' identification of the defendant, including, but not limited to, any of the following:
>
> The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;
>
> The stress, if any, to which the witness was subjected at the time of the observation;
>
> The witness' ability, following the observation, to provide a description of the perpetrator of the act;
>
> The extent to which the defendant either fits or does not fit the description of the perpetrator of the act;
>
> The witness' capacity to make an identification;
>
> Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;
>
> Whether the witness was able to identify the alleged perpetrator in a photographic or physical line-up;
>
> The period of time between the alleged criminal act and the witness' identification;
>
> Whether the witness had prior contacts with the alleged perpetrator;
>
> The extent to which the witness is either certain or uncertain of the identification;
>
> Whether the witness' identification is in fact the product of her own recollection;
>
> and;
>
> Any other evidence relating to the witness' ability to make an identification.

CT at 263-64.

argument and cross-examination by petitioner's counsel attacking the reliability of Behl and Garcia's identification, the eyewitness identification testimony was not critical to petitioner's defense and did not preclude argument attacking Behl and Garcia's identification. Petitioner cannot show that he was prejudiced by any alleged error since the exclusion of the expert testimony about eyewitness identification was inconsequential. Hence, petitioner's due process rights were not violated. The California Court of Appeal did not unreasonably apply Supreme Court precedent in concluding that the court did not violate petitioner's due process rights by excluding the eyewitness testimony. Ex. 6, attached Ex. A, at 9–10. The state court's factual determination should be upheld as it was not unreasonable. 28 U.S.C. § 2254(d)(2).

II.

THE STATE COURT REASONABLY DETERMINED THAT PETITIONER WAS NOT PREJUDICED BY THE ADMISSION OF OFFICER JADALLAH'S LAY OPINION TESTIMONY

Oakland Police Officer Jadallah, the robbery investigator, testified that he had observed a connection between drug users and criminal activity. Petitioner contends that this testimony amounted to improper propensity evidence and that he received ineffective assistance of counsel because his attorney failed to object the evidence on this ground.

A. State Court Proceedings

In the prosecution's rebuttal case, the prosecutor recalled Oakland Police Officer Jadallah to testify. The prosecutor asked Officer Jadallah about his interview with petitioner after petitioner had been identified as the robber at the physical lineup. At one point the following exchange took place:

> [Prosecutor]: Now, did you talk to [petitioner] about his drug use?
>
> [Jadallah]: Yes.
>
> [Prosecutor]: What did he say about his drug use?
>
> [Jadallah]: He said that he smokes crack cocaine.
>
> [Prosecutor]: Did he say he smoked as in past tense, or did he say currently smoked crack cocaine?
>
> [Jadallah]: It was current.

[Prosecutor]: Did you ask him about any other drug or alcohol use?

[Jadallah]: He indicated that he drinks beer, but no hard alcohol.

[Prosecutor]: The fact that [petitioner] admitted to currently smoking crack cocaine, did it have any significance to you?

[Jadallah]: Yes, it did.

[Prosecutor]: What was that?

[Jadallah]: Typically, people with drug habits commit robberies to support their habit.

[Defense counsel]: Objection. Speculation.

THE COURT: You can lay a foundation for him stating the opinion, if you wish.

[Prosecutor]: Thank you. [] You were part of the robbery team, is that right, for the Oakland Police Department?

[Jadallah]: Yes.

[Prosecutor]: And youve been investigating robberies?

[Jadallah]: Yes.

[Prosecutor]: For how long?

[Jadallah]: A little over four years.

[Prosecutor]: You said the area that you are investigating the robberies in includes a portion of East Oakland; is that right?

[Jadallah]: Yes.

[Prosecutor]: And how many robberies would you say that you have investigated?

[Jadallah]: Hundreds.

[Prosecutor]: And in investigating these hundreds-or-so robberies, have you made a connection between drug use, and the people that have committed the robberies?

[Jadallah]: Yes.

[Prosecution]: And what is that connection?

[Jadallah]: That they have drug habits.

[Prosecutor]: Is that oftentimes or all the time?

[Jadallah]: Often.

> [Prosecutor]: Not necessarily all the time?
>
> [Jadallah]: That's correct.
>
> [Prosecutor]: Did the fact that [petitioner] admitted to smoking crack cocaine have any significance to you in relation to the information you learned from Eric Delk?
>
> [Jadallah]: It was significant because it corroborated what Eric Delk had told officers.

RT 377–78.

At the conclusion of the case, petitioner's counsel argued against an expert witness jury instruction contending that Officer Jadallah did not qualify as an expert on this issue and the trial court agreed. RT 400–01. Rather than providing an instruction based on expert witness testimony, the court provided a jury instruction (CALJIC No. 2.81) regarding the opinion testimony of a lay witness pursuant to California Evidence Code section 800[3/]. No further objections were made to Officer Jadallah's testimony.

Although no objections to the testimony were raised in the trial court, the appellate court determined that the testimony of Officer Jadallah was improper lay opinion under state law:

> Officer Jadallah's rebuttal testimony went beyond the permissible scope of lay opinion. The prosecution examined Officer Jadallah about his interview with appellant during the investigation of the robbery. Officer Jadallah's opinion about the correlation between drug use and robbery was not related to his perception of the interview, nor was it relevant to help the jury understand this particular robbery. Officer Jadallah's statements suggested appellant's admitted drug use made it more likely he committed the robbery. Rather than help the jury better understand his personal observations during the interview, Officer Jadallah's opinion merely bolstered the prosecutions arguments. The prosecution could have attempted to offer the testimony as expert opinion under Evidence Code section 801. Officer Jadallah's testimony related facts beyond common experience and his background investigating robberies fit the threshold requirements of expert opinion testimony. The court seemed to expect this approach when it invited counsel to lay a foundation for Officer Jadallah's testimony. However, the People never offered Officer Jadallah as an expert, at which time the court would have considered fully whether expert opinion was even admissible on the topic for which it was offered. Defense counsel did

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3. California Evidence Code section 800 provides:
If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
(a) Rationally based on the perception of the witness; and
(b) Helpful to a clear understanding of his testimony.

> not cross-examine Jadallah on his qualifications, object to any purported expertise or the propriety of expert opinion, or renew its earlier objection. Ultimately, during the discussion over jury instructions, the trial court correctly denied an expert witness jury instruction with respect to this testimony.

However, although the appellate court found state law error in the admission of the testimony being presented as lay opinion, the court also found that no prejudice resulted from the admission:

> The trial court erred by permitting Officer Jadallah's lay opinion. However, the defense did not move to strike the testimony nor request an admonishment to the jury. But any error with respect to the testimony was harmless because it is not reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson* (*supra*) 46 Cal.2d 818, 836.)
>
> The two victims positively and confidently identified appellant as the robber and their testimony was corroborated by the statements of appellant's step-brother, Eric Delk. The swiftness of the jury's verdict again suggests little deliberation was required to convict. Consequently, we cannot say exclusion of the testimony would have been likely to render a different verdict.

B. The Claim Is Procedurally Defaulted; However, Even If Cognizable, The State Court's Decision Was Neither Contrary To, Nor Involved, An Unreasonable Application Of Clearly Established United States Supreme Court Authority

Petitioner now contends that the testimony of Officer Jadallah should have been excluded under California Evidence Code section 1101[4/] as improper evidence of a propensity for committing crime. Petition at 6. First, petitioner failed to object on this ground at trial; thus the objection was waived and this claim is procedurally defaulted. Specifically, the appellate court found,

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4. Evidence Code section 1101 states:

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

> Appellant also objects Officer Jadallah's testimony constituted unduly prejudicial and/or improper propensity evidence under Evidence Code section 1101. However, appellant filed to raise this objection before the trial court and therefore it is waived on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 431.

Ex. 6, attached Ex. A at 13, fn. 5; see also 13 [". . .the defense did not move to strike the testimony nor request an admonishment to the jury.")

For reasons of comity, the federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal ground and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The Ninth Circuit has recognized that California's contemporaneous objection rule constitutes a valid state bar that precludes federal habeas review. *See Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir. 2004) (failure to object based on constitutional grounds where only evidentiary objection was raised at trial); *Jackson v. Giurbino*, 364 F.3d 1002, 1006-007 (9th Cir. 2004) (failure to object to prosecutor's argument); *Rich v. Calderon*, 187 F.3d 1064, 1070 (9th Cir. 1999) (same). As petitioner has made no attempt to overcome the default by demonstrating cause and prejudice or a fundamental miscarriage of justice, *Coleman v. Thompson*, 501 U.S. at 750, this Court cannot reach the claim. Even if it could, no constitutional error occurred.

To demonstrate a claim of erroneous admission of evidence, petitioner must show that he was denied a fair trial. *See Estelle v. McGuire*, 502 U.S. at 67 (state court's evidentiary ruling does not violate due process unless evidence was so prejudicial as to render the trial unfair). As the appellate court reasonably found, the testimony presented as "lay opinion" by Officer Jadallah clearly did not render the trial unfair. The evidence of drug use was introduced during Delk's testimony by a statement Delk made to investigators that petitioner had a drug problem and was "always getting high." RT 212. When petitioner testified, he admitted that although he "messed around" with drugs, he did not "have a big thing of a [sic] dope." RT 332. Petitioner also admitted that when he was arrested, police officers found crack cocaine in the bedroom of the house where he was staying, but stated that the cocaine was not his. RT 336. In the rebuttal, Officer Jadallah testified that during his interview of petitioner immediately following the photo lineup, petitioner admitted to Officer Jadallah that he did smoke crack cocaine. RT 377. Thus, the statement from

Officer Jadallah was also proper to impeach petitioner's claim that he had only "messed around" with drugs.

Moreover, the appellate court also rejected petitioner's alternative claim of ineffective assistance of counsel because no prejudice resulted:

> Whether or not the evidence was admissible as propensity evidence, no prejudice can be ascribed to the failure to object. As set forth above, appellant fails to demonstrate a reasonable probability that Officer Jadallah's opinion testimony affected the verdict.

Ex.6, attached Ex. A at 13, fn. 5.

The ineffective assistance of counsel claim cannot overcome the default, because the appellate court reasonably found that petitioner could not establish prejudice. Further, in order to establish that counsel was ineffective, petitioner bears the burden of showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 695-96 (1984). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id*. at 694. In order to prevail, petitioner must "affirmatively prove prejudice." *Id*. at 693. The reviewing court need not assess counsel's performance where it is clear that petitioner cannot show the requisite prejudice. *Id*. at 697; *Williams v. Calderon*, 52 F.3d 1465, 1470 n. 3 (9th Cir. 1995).

Moreover, petitioner "must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). Rather, petitioner must show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Id*. Thus, federal habeas review of a claim of ineffective assistance is "doubly deferential." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam).

Here, as discussed by the prosecutor in his closing argument, a significance of Officer Jadallah's connection between smoking crack cocaine and the robbery was not that, because of a drug dependency, petitioner was therefore predisposed to commit robbery. Rather, this evidence, together with petitioner's admitted need for rent money on February 3, 2005 (RT 330, 347), served

as evidence of a motive for him to have committed the robbery at the gas station. RT 440–41. This is a proper application of the evidence under California Evidence Code sections 1101 (a) and (b). Defense counsel thus reasonably could have concluded that an objection would have been futile.

Further, as the state court found, there was other significant evidence of petitioner's guilt. Petitioner's stepbrother provided the initial information to police officers that petitioner was the suspect in the robbery, and restated the information to investigators as recently as one week before trial. RT 186, 188–89, 191–92, 209–12, 237. Upon receipt of Delk's statement, the robbery investigator promptly conducted an independent lineup to corroborate the information that had been received. RT 241–42, 244, 248. Each of the victims of the robbery independently and positively identified petitioner, whom they also recognized as a previous customer, as the person who committed the robbery.

Accordingly, under the double deference standard, petitioner cannot show that the state court's decision finding no prejudice based on the admission of Officer Jadallah's testimony with respect to a connection between criminal activity and drug use was objectively unreasonable. *See Woodford v. Visciotti*, 537 U.S. at 26-27 (state court's conclusion that petitioner had not established prejudice under *Strickland* was not unreasonable).

III.

THERE WAS NO CUMULATIVE PREJUDICIAL ERROR

Petitioner claims that he was deprived of due process and a fair trial as a result of the cumulative effect of the errors previously raised in his petition. Petition at 7. Petitioner raised this claim in the appellate court and the claim was rejected as follows:

> Appellant asserts the errors here were cumulatively prejudicial. However, because we have determined there was no error, this contention fails.

Ex. 6, attached Ex. A at 13, fn. 7.

Because there was no prejudicial federal constitutional error with respect to any of Petitioner's individual claims, there is no cumulative prejudicial federal constitutional error. *See e.g., Villafuerte v. Stewart*, 111 F.3d 616, 632 (9th Cir. 1997); *Hamilton v. Vasquez*, 17 F.3d 1149, 1155 (9th Cir. 1994); *see also Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (no federal rights

violation so no basis to grant writ for cumulative error); *Cooey v. Anderson*, 988 F. Supp. 1066, 1095-96 (N.D. Ohio 1997) (citing *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992) (en banc) (cumulative error does not consider non-constitutional error nor defaulted claims).)

In sum, petitioner's cumulative error claim is not cognizable and it fails in any event because of the state appellate court's reasonable decision that no cumulative error occurred.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for writ of habeas corpus be denied.

Dated: June 26, 2008

Respectfully submitted,

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